LIN SECURITIES PTE.

v.

NOONE & CO. SDN. BHD. & ANOR. (2)

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C-23-1052-86]
14 JUNE 1989

CIVIL PROCEDURE: *Order 14 application - Defence filed - Counsel for defendant raised further points not raised in the statement of defence at the O.14 proceedings - Whether defendant bound by pleadings.*

CONTRACT: *Forward contract - Off market transactions - Whether illegal or against public policy - Law governing contract - Directives by Singapore Stock Exchange - Whether matter suitable for disposal summarily.*

The plaintiff and defendant were stocks and shares brokers in Singapore and Kuala Lumpur respectively. By a contract note dated 6 November 1985 the plaintiff was to obtain 2,000,000 shares in Grand United Holdings Ltd. ("GUH") for the defendant at S$3,420,000. The date of delivery for the said shares was 20 December 1985. The defendant accepted the shares and made two payments towards the purchase price leaving a balance of S$760,000. The plaintiff claimed this amount and was granted summary judgment by the Senior Assistant Registrar. This is the defendant's appeal from that order.

In their defence and counter claim the defendant contended that the contract is void or illegal or against public policy or is in any event unenforceable. At the O. 14 hearing Counsel for the defendant referred to press releases made by the chief executive and the manager of the Singapore Stock Exchange relating to the terms under which brokers should transact and also argued that the contract was governed by Singapore law and was not suitable for disposal summarily.

Held:

[1] A defendant though bound by the four corners of his pleading at the trial of the action but he is not so bound at the O. 14 proceedings.

[2] Order 14 r. (4)(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise, and as such the defendant is entitled to show at the hearing of the O. 14 application that over and above what has been pleaded in the statement of defence he has other defences.

[3] There are many questions to be dealt with in this matter, some of which are difficult questions of law and this provides sufficient cause to deny the plaintiffs summary judgment.

[Appeal Allowed.]

Cases referred to:
The Western National Bank of New York v. Perez Triana & Co. [1891] 6 TLR 366
Lin Securities (Pte) v. OSK & Partners Sdn. Bhd. [1987] 2 MLJ 568
Ertel Bieber v. Rio Tinto Co. Ltd. [1918] 118 LTR 181
Floyd v. Guibert & Ors. [1865] 1 QBD 115

Legislation referred to:
Contracts Act 1950, s. 66
Rules of the High Court 1980, O. 14 r. 4(1)

Other sources referred to:
White Book 1985, para. 14/3-4/11
Dicey & Morris on the Conflict of Laws, 10th Edn., p. 1209
Halsbury 4th Edn., Vol. 8, p. 511/512, Vol. 36, p. 32/33

For the defendant/appellants - J.S. Gill; M/s. Gill Cheah & Co.
For the plaintiffs/respondents - S.M. Yoong; M/s. Shook Lin & Bok

JUDGMENT

VC George J:

[On encl. 32]

Pursuant to an agreement, evidenced by a contract note dated 6 November 1985, between the plaintiffs and the defendants each of whom were stocks and shares brokers in Singapore and Kuala Lumpur respectively, the plaintiffs delivered to the defendants 800,000 shares in a company called Grand United Holding Ltd. (GUH) whose shares were quoted in the Singapore Stock Exchange. The agreed purchase price of the shares at Singapore dollars one point seven on (S$1.710) per share amounted S$1,368,000. The defendant accepted delivery of the 800,000 shares and made two payments towards the purchase price leaving a balance of S$760,940 still to be paid. The plaintiffs' claim is for that amount, interest and costs.

By the terms of the contract, as seen on the face of the contract note which apparently was issued at Singapore by the Singapore plaintiffs on 6 November 1985, the plaintiffs were to obtain 2,000,000 GUH shares for the defendants for S$3,420,000 i.e. at $1.710 per share and it was agreed that the delivery date for the shares be 20 December 1985.

The defendants filed a statement of defence and counterclaim. They contend by the statement of defence *inter alia* that the contract is void in that it was illegal or against public policy or is in any event unenforceable. There were other defences which were apparently not relied upon either at the O. 14 proceedings or in this appeal from the O. 14 judgment. At hearing of the O. 14 summons, Counsel for the defendants apparently had taken up a further point which had not been pleaded in the statement of defence namely that the law governing the contract in which the suit was based was Singapore law and that accordingly the matter was in any event not suitable for disposal summarily. The learned Senior Assistant Registrar disagreed with the submission made on behalf of the defendants and gave the summary judgment. The matter before me is the defendants' appeal from that order.

Before me Encik Jagjit Singh Gill of Counsel for the defendants, again sought to rely on the foreign law point. The objections of Cik S.M. Yoong for the plaintiffs on the reliance on this on the grounds that that point had not been pleaded in the statement of defence, is misconceived. No doubt a defendant is bound by the four corners of his pleading at the trial of the action but he is not so bound at the O. 14 proceedings. Order 14 r. 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O. 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O. 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

The defendants relied on affidavits sworn by one of its directors, one Noorjehan Rahima bt. Abdul Hamid Jumat. She says that the contract is a forward contract and contends that as such it is illegal or against public policy or in any event unenforceable. She says that on

5 December 1985 all trading on GUH shares were suspended by both the Singapore and the Kuala Lumpur Stock Exchanges and that such suspension had not been lifted when the writ was caused to be issued. Apparently the defendants are also relying on certain directives alleged to have been made by the Singapore Stock Exchange for evidence of which the said Noorjehan Rahima purported to rely on what was said to be two press releases said to have been made one by the chief executive of the Singapore Stock Exchange and the other by its general manager. The first of these releases appear to be dated 2 December 1985 and is to the effect that trading will be suspended with effect from 2 December 1985 until further notice with a proviso that "Delivery and payment in respect of previous contract entered into by member firms with clients will continue". The second is dated 4 December 1985. By it, members (presumably of the Stock Exchange), are advised that trading will resume on 5 December 1985 "on an immediate delivery basis". It goes on to state that "the following are to be strictly adhered to:

1) Selling clients must deliver their scripts on the market day following the date of transaction.

2) Selling brokers must deliver to the clearing house on the second market day following the date of transaction, failing which buying in will be effected.

3) No contra deals are allowed.

4) No off-market transactions are allowed.

5) Forward contracts are strictly prohibited.

Encik Jagjit Singh Gill contends that in effect these press releases show that by Singapore law, which he contends is the law relevant to the contract, *inter alia* forward contracts and off market transactions pertaining to stock market transactions were illegal. He contends that the contract on which the plaintiffs base their claim is an off market transaction and is also a forward contract and as such on each count was illegal and accordingly void.

Encik Gill referred to para. 14/3-4/11 of the *1985 White Book* to submit that leave to defend should be given where a claim depends on foreign law. The *Western National Bank of New York v. Perez Triana & Co.* [1891] 6 TLR 366 was relied on in the *White Book* in which case Lord Coleridge said that it was impossible for the Court to try a question as to the law of New York on affidavits. *Dicey & Morris on the Conflict of Laws*, 10 Edn. refer to a number of cases at p. 1209 to hold that "It is now well settled that foreign law must in general be proved by expert evidence". Encik Gill also sought reliance on *Lin Securities (PTE) v. OSK & Partners Sdn. Bhd.* [1987] 2 MLJ 568 where the question arose as to whether Malaysian or Singapore law applied in respect of the contract on which the plaintiffs sued. LP Thean J refrained from expressing any opinion on that since he was of the view that that would be an issue to try at the trial. I agree with Cik S.M. Yoong of Counsel for the plaintiffs that that expression of his view on the matter was made by Thean J *obiter* and has no direct relevance to the situation obtaining in the issues before this Court in this appeal. But that case does teach that the question of whether foreign law applies or not could itself be an issue to be tried.

Cik Yoong also contended that there is a presumption that foreign law is identical of Malaysian law and that it was for the defendants to show that there was a difference between the laws of Malaysia and Singapore on the point. She cited *Ertel Bieber v. Rio Tinto Co. Ltd.* [1918] 118 LTR 181 and *Floyd v. Guibert & Ors.* [1865] 1 QBD 115 and also referred to *Halsbury* 4th Edn., Vol. 8, p. 511/512 and Vol. 36, p. 32/33.

As far as Malaysian law is concerned I am not aware that a forward contract or an off market contract is illegal. But is was brought to the attention of the Court without challenge that the Singapore Stock Exchange had released a directive to the effect that such contracts are prohibited. If that prohibition has the weight of law in Singapore and if Singapore law is relevant then the presumption that Cik Yoong referred to if not unrebutted has certainly been watered down. Cik Yoong highlighted the proviso to the press release of 2 December 1985 but a further question that arises is the effect of that proviso in the face of the terms of the press release of 4 December 1985 - is the press release of 4 December to be read with that of 2 December or has 4 December directive superceded the earlier? Cik Yoong also referred me to the effect of s. 66 of our Contracts Act. However is that section relevant if the law to be applied is Singapore law?

I have anxiously and carefully gone over the submissions that were made by learned Counsels as well as the cause papers again and again and have to conclude that there are far too many questions to be dealt with in this matter, some of which are difficult questions of law. One such question is whether Singapore law applies. If it does then that alone provides sufficient cause to deny the plaintiffs summary judgment. The appeal is allowed. The O. 14 judgment is set aside. The defendants are given unconditional leave to defend.

Also found at [1989] 2 CLJ 847